

State of California

M E M O R A N D U M

Date: July 3, 1989

To: Chairman Larson, Commissioners Aparicio  
Fenimore, Rattigan and Vial

From: FAIR POLITICAL PRACTICES COMMISSION  
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Subject: Settlement Policies and Procedures

The Commission is responsible for administering, interpreting, and enforcing the Political Reform Act ("Act").<sup>1/</sup> With regard to its enforcement responsibilities, the Commission acts as both prosecutor and judge. With regard to its judicial function, the Commission is afforded the opportunity to participate in Administrative Hearings as triers of the facts. In order to assure both the respondents who may appear before them, and the public, of its fairness, receptiveness, and impartiality, the prosecutorial function has historically been delegated to the agency's Enforcement Division.

Enforcement cases are frequently resolved through settlements negotiated by the Enforcement Division. In settling a case, the Enforcement Division decides on the appropriate charges and penalty; negotiates the settlement; and presents the agreement to the Commission for approval.

This memorandum addresses the following issues regarding the Enforcement Division's prosecutorial function: how the Enforcement Division views its role; how the Division determines the appropriate disposition of a case; and how the Division structures a particular settlement for presentation to the Commission.

THE ROLE OF THE ENFORCEMENT DIVISION

Unlike civil wrongs, in which private redress is obtained through individual lawsuits for damages, violations of the Act are offenses against the public interest. A public prosecutor is therefore necessary to enforce the Act and effectuate its purposes.

The Commission has delegated to the Enforcement Division the responsibility for acting as prosecutor. The Enforcement Division investigates suspected violations of the Act, initiates enforcement proceedings when necessary, and represents the

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<sup>1/</sup> The Political Reform Act is contained in Government Code Section 81000 et seq.

Commission in presenting evidence of violations to the trier of fact in either administrative or civil proceedings.<sup>2/</sup>

As public prosecutors, we are keenly aware that, in all our activities, our duties are conditioned by the fact that we are "representatives not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a prosecution is not that it shall win a case, but that justice shall be done." (ABA Code Prof. Resp. EC7-13, at 33c; *People v. Superior Court (Greer)* 19 Cal.3d. 255. (1977).)

We recognize that "society has an interest in both the reality and the appearance of impartiality by its prosecuting officials." (*People v. Superior Court (Greer)*, supra.) Consequently, it is essential that the public have absolute confidence in the integrity and impartiality of the Enforcement Division. As such, a conscientious effort is extended in every case to ensure that fairness and justice prevail.

Inherent in the prosecutorial function is the concept of prosecutorial discretion. The Enforcement Division recognizes that the Commission has given us the flexibility or discretion necessary to discharge our responsibilities in accordance with the trust invested in us by the public. The exercise of this discretion is vital to the proper execution of our duties because the entire process of enforcing laws promulgated in the public interest involves balancing the interests of society against those interests of individuals who may threaten its well-being through wrongful conduct.

Unfortunately, prosecutorial discretion defies precise definition or application. There is no specific formula to apply in every situation. Rather, the proper exercise of discretion requires flexibility to balance competing interests. In order to assure that the ends of justice have been satisfied, we need both the freedom to investigate the facts and the flexibility to evaluate the circumstances surrounding the case before deciding whether to initiate or proceed with prosecution.

Without this ability to balance or weigh factors and determine what course of action should be pursued as appropriate, we would merely become advocates as opposed to prosecutors. As advocates only, there would be no need to balance competing interests. We would merely determine whether the facts in a particular case were sufficient to prove a violation by a preponderance of the evidence.

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<sup>2/</sup> Under the provisions of Section 91001(b), the Commission is the "civil prosecutor" with respect to the state or any state agency, except itself. As such, it is primarily responsible for the enforcement of the civil penalties and remedies of the Act.

This is not to suggest that in acting as prosecutor we neglect our advocacy function. Quite the contrary, once a decision is made to bring an action, we prosecute with vigor, fully conscientious that prosecution is a necessary and required procedure in the administration of justice. However, "While the...[prosecuting] attorney is at liberty to strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods as it is to use legitimate means to bring about a just one." (Berger v. United States (1935) 295 U.S. 78, 88; 55 S. Ct. 629, 633)

#### DETERMINING DISPOSITION OF A CASE

At the conclusion of an investigation, the attorney responsible for the prosecution of the case determines what violations of the Act have occurred. This process requires a thorough knowledge of the case since the attorney must decide not only how likely each element of every violation can be established by a preponderance of the evidence at a hearing, but also whether each violation should be prosecuted. Of course, this latter consideration requires the use of discretion as discussed above.

Prior to engaging in settlement discussions, the staff makes a determination regarding how many violations will be included in the Stipulation, how the violations will be stated, and the appropriate penalty to be imposed. It must be emphasized that undertaking settlement negotiations may involve objectives that are different from those considered when preparing for a hearing or trial.

When preparing for a probable cause or administrative hearing, the attorney is conscious that the objective of the proceeding is to prove all violations of the Act by a preponderance of the evidence. The attorney is also aware that in an adversary proceeding, the trier of fact may feel differently about certain issues or charges in the case. Accordingly, the attorney must allege all charges in the pleading to ensure thorough litigation of the issues.

Conversely, the objective of a settlement is not to allege every violation that may have been committed, but to fairly and accurately allege those violations which most appropriately describe the wrongful conduct and provide for an adequate fine.

In order to determine what the appropriate fine should be in each case, the Division answers the following questions:

(1) What specific violations can we prove by a preponderance of the evidence?

Prior to negotiations, we isolate the particular violations in the case and determine which violations best describe the overall conduct. Implicit in this analysis is an assessment of the strengths and weaknesses of the case. The relative difficulties in successfully prosecuting a particular count or a particular case may affect our negotiations and cause us to accept a lower fine. On the other hand, once we determine the appropriate fine, we have not increased it because our case is strong. The fact that our case is strong enables us to justifiably demand the appropriate fine.

When negotiating a settlement, our primary objective is to allege in the Stipulation, and demand that the respondent admit, those violations which most appropriately describe the wrongful conduct and support the appropriate fine under the facts of the case.

(2) What factors should be considered in determining the appropriate fine?

Title 2, California Code of Regulations, Section 18361(e)(4), sets forth relevant criteria to consider in determining the fine. As such, we evaluate the particular facts of the case in light of that regulation. Specifically, we determine:

(a) The seriousness of the violation;

To determine the seriousness of a violation, we ask ourselves what was the articulable harm to the public as a result of respondent's conduct. Generally speaking, the greater the harm to the political or governmental process, to the public's right to be informed, or to a group or individual, the greater the seriousness of the violation, and the larger the corresponding fine.

The seriousness of a violation is determined by the facts and circumstances of a particular case, although some violations appear to be inherently more serious than others because the public harm is greater from their perpetration.

For example, "laundering" is considered one of the most serious violations of the Act. The term is used to describe conduct which results in the true source of a campaign contribution not being disclosed on a campaign statement. Hiding the true source of the contribution undermines one of the basic purposes of the Act, which is that "receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices

may be inhibited". (Section 81002 (a).) Laundering almost always involves intentional conduct. Frequently it is done to thwart other laws, such as contribution limitations, or to withhold information viewed as "undesirable", such as the fact that a candidate, located in an area with voters having no-growth sentiments, is supported by developers.

A conflict of interest violation is another example of an inherently serious violation. The conflict of interest provisions were enacted to ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Violations of these provisions undermine the public's confidence in its elected officials and government.

Staff also realizes that frequently the seriousness of a violation is determined by the specific facts of the case. Identical violations in different cases may be assessed differently in terms of seriousness depending upon the particular facts and circumstances involved. By way of illustration, assume two different cases in which there are mass mailing violations because neither mailing contains any sender identification. In one of those cases, the mailer is commonly known as a "hit piece", because it contains negative information about the sender's opponent; whereas in the other case, the mailer merely extolls the virtues of the candidate who sent the mailing. Additionally, in the first case, the election is extremely close, thousands of the negative mailers were sent and the sender of the negative mailing won. In the second case, the election was a landslide, only a couple hundred of the mailers were sent, and the candidate responsible for the mailing lost. Although both cases contain the identical violation, we would determine that the degree of public harm was much greater in the former case and fix the fine accordingly.

(b) The presence or absence of any intention to conceal, deceive, or mislead;

The respondent's state of mind at the time the violation occurred is an important consideration. If the evidence indicates an intent by the respondent to conceal, deceive, or mislead, we have considered that fact as aggravating information. A "laundering" situation, for example, generally involves intentional conduct which deceives the voters because they are unaware of the true source of the contribution. This act, designed to mislead, is afforded the highest fine. Similarly, if the conduct of the respondent in a particular case demonstrated prior experience in political campaigns, or sophistication in committing the violation, this factor is generally considered aggravating information.

On the other hand, absence of intent to deceive, inexperience in political campaigns, or lack of sophistication in committing the violation, is generally considered mitigating information.

(c) Whether the violation was deliberate, negligent, or inadvertent;

Depending upon the respondent's state of mind, we have assessed different levels of culpability. Pursuant to the policy of the Commission, we have exercised our prosecutorial discretion and have not prosecuted for inadvertent violations.

If the conduct which led to the violation was deliberate, generally speaking, a higher fine is imposed since that factor is generally considered aggravating.

(d) Whether the violator demonstrated good faith by consulting the Commission staff or any other governmental agency in a manner not constituting a complete defense;

(e) Whether the violation was isolated or part of a pattern;

In some cases, the evidence may indicate an isolated incident and violation. In addition, the facts in a particular case may prove that, although the respondent committed multiple violations of the Act, those violations were the result of a single error of law or fact. In that event, the multiple violations may be consolidated into a single count because that would best represent the conduct in question.

On the other hand, the evidence may demonstrate a deliberate or elaborate course of conduct which resulted in a number of distinct violations. Generally, under that scenario, violations would be separately charged.

(f) Whether the violator has a prior record of violations of the Political Reform Act or similar laws;

We consider the respondent's prior record, including recency, frequency and nature of previous violations, as aggravating information which may increase the fine. Certainly, respondent's prior record is considered in determining whether to initiate prosecution.

We have also been taking into consideration and alleging as mitigating information in the Stipulation, the fact that the respondent has no prior record of Political Reform Act violations.

(g) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.

Depending upon the circumstances surrounding the submission of amendments, as well as the amendments themselves, we may exercise our discretion and determine not to prosecute at all. For example, if the respondent filed amendments prior to our investigation and the original filings did not contain serious omissions, we would probably decline prosecution. Similarly, we would generally decline to proceed with prosecution of a Major Donor if that individual filed the necessary campaign statement within a reasonable time after contact by the Commission.

Even if prosecution has commenced and continues, we consider and allege the filing of amendments as mitigating information in the Stipulation.

The factors just described generally can, and are, applied in each case. However, there may be other factors which could be considered relevant and important to a determination of the proper fine. For example, we have considered the cooperativeness, or lack thereof, of the respondent during the course of the investigation, his willingness or refusal to comply with FPPC requests, and his voluntary acknowledgment of wrongdoing at an early stage of the proceedings. We are cognizant that any given case may present different or additional factors for consideration. As such, any list that is proffered must be considered illustrative only.

(3) Can the case be compared with previous cases?

By virtue of the position entrusted to us we are required to be fair and impartial. Thus, respondents are treated as uniformly as the particular facts of a case allow. We understand that no two cases are exactly alike. However, there are certain similarities between cases with nearly identical violations which enable us to make reasonable comparisons. Therefore, as much as practicable, we compare a case in which we are determining the appropriate fine with other similar cases and dispositions to achieve uniformity in sentencing and avoid disproportionate results.

#### STRUCTURING THE SETTLEMENT

(a) Specifying the charges

Although there are innumerable ways to structure a stipulation, it is of the utmost importance to allege those violations which best describe the applicable conduct in the case and allow for the appropriate penalty.

The Stipulation is structured according to the particulars of the case. We may have determined that the violations were committed at different times and are each-significant, in which case we generally state each violation as a separate count.

"Laundering cases" generally fall into this category. On the other hand, even if we have multiple violations, if we have determined that they were committed so closely in time as to indicate a single course of conduct or single error, we may group them into one count for purposes of settlement.

Similarly, we may determine that some of the violations are de minimis or technical in nature and do not accurately portray significant independent conduct. In such a case, for purposes of settlement, we may not charge the violations at all, or we may consolidate them into a single count.

We may group violations by code section in a single count, particularly if there are multiple violations of the same code section which, because of the facts of the particular case, do not merit individual treatment. For example, when a committee fails to disclose occupation/employment information for a number of contributors, we may determine it is most appropriate to allege those violations in a single count.

On occasion, violations may be grouped chronologically by statement or report, especially where several reports or statements contain violations of the same code section. For example, we might group all campaign omissions occurring on the same statement in one count and all campaign omissions occurring on a different statement in a different count.

Again, the most important factor to consider in structuring the Stipulation is whether those violations which best describe the conduct of the case have been alleged.

(b) Format of the Stipulation

The Stipulation represents the agreement entered into in lieu of litigation between the respondent and the Fair Political Practices Commission. Its content includes a recitation of the violations of the Act that were committed in the particular case, along with a legal explanation of the violations. These violations are expressed by counts and multiple violations may be expressed in a single count for reasons discussed above. The document also includes a statement of the pertinent facts in the case as well as mitigating and aggravating information.

When respondents agree to the settlement of their case, the prosecuting attorney drafts a proposed Stipulation which must be approved by the Chief of the Enforcement Division and the Executive Director. After such approval, the document is forwarded to the respondent for acceptance or discussion concerning particular language in the document. As the Stipulation is a negotiated settlement of the case, revisions sometimes occur. Once the Stipulation is agreeable to both sides, a final form is drafted and signed by the respondent and the Executive Director.



(c) Presentation of Stipulations

Generally, Stipulations are presented by the case attorney at the next regularly scheduled Commission meeting after receipt. In presenting the case, the prosecuting attorney carefully explains both the violations which are the subject of the Stipulation and the facts which support those violations.

We generally believe that presenting stipulations to the Commission should be fairly limited to the facts as they appear in the document. Since the respondent has negotiated the language in the Stipulation, it appears that he should be present and consent to recitation of facts not contained within that document. Additionally, since the Stipulation becomes an order only after approval by the Commission, the case attorney must be careful to avoid amplification of facts that go beyond the Stipulation in the event that document is rejected and the Commission chooses to participate in the Administrative Hearing of the case.

CONCLUSION

Resolution of enforcement cases by stipulation rather than trial is desirable from everyone's perspective. We believe that the historical delegation to the staff of authority to investigate, prosecute, and negotiate case settlements subject to Commission approval rests upon sound legal, ethical and practical considerations. We believe that by applying the principles discussed above, we have established an enforcement program that is efficient, fair and serves its purpose of encouraging voluntary compliance through appropriate enforcement action. We welcome direction from the Commission as to our exercise of discretion or procedure.